

1 A. Yes.

2 Q. That is the entity that is --

3 MR. BLUMENTHAL: Your Honor, I'd just
4 correct the record. I think it's in the lower
5 left-hand corner. Didn't you say lower right-hand
6 corner?

7 MR. WILSON: I did, but -- and you'll have
8 to just listen to what I'm thinking.

9 Q. (By Mr. Wilson) Lower left-hand corner,
10 please.

11 A. That's correct.

12 Q. Thank you. We'll be okay if we don't get
13 any worse than that.

14 And that is an entity -- Management is,
15 again, the entity that is controlled 50 percent by an
16 entity you own and 50 percent by an entity
17 Mr. Wickline owns?

18 A. That's correct.

19 Q. Thank you. And would you look at Form C,
20 please.

21 A. I'm sorry?

22 Q. Form C. It's the next page. Six of
23 eight.

24 A. Oh, yes.

25 Q. Thank you. And do you find that, as in

1 the case of the previous page, that the name of one
2 entity has been lined out and another entity has been
3 written in its place?

4 A. That's correct.

5 Q. Thank you. Was there any meeting of the
6 members or managers of Management in which the issue
7 of this liquor license application was discussed?

8 A. No.

9 Q. Thank you. I'm wondering if you would
10 please reach for the white binder and turn, please,
11 to Exhibit 9 -- I believe that's been admitted -- and
12 describe briefly for the Court what Exhibit 9 is.

13 A. This is a draft of an employment agreement
14 between myself and Heber Avenue, LLC for my continued
15 involvement, post confirmation.

16 Q. Thank you. Have you signed this document?

17 A. No, I have not.

18 Q. But has Heber Avenue Partners signed the
19 document?

20 A. It appears so, yes, sir.

21 Q. Are you in agreement with the terms of
22 this employment agreement?

23 A. We are in agreement with most of the
24 terms. There is one part that has not been
25 completed.

1 Q. What part is that?

2 A. It has to do with the management contract
3 for Gemstone as it relates to a clause that we have
4 not yet seen.

5 Q. Okay. Thank you. Would you turn to page
6 three of Exhibit 9?

7 A. Yes.

8 Q. And I'll refer you to -- it will be
9 paragraph 4, but it's subparagraph (c), small c in
10 parenthesis.

11 A. Yes.

12 Q. It's short. Would you just read that
13 provision, please?

14 A. "In the event the employee is successful
15 in consummating the license transfer, employee shall
16 be entitled to a," quote, "'transition bonus,'" end
17 quote, "of \$240,000 payable at employee's option,
18 either in lump sum within 30 days following the
19 license transfer or in equal monthly installments
20 over the balance of the employment term."

21 Q. And you are the employee?

22 A. That's correct.

23 Q. All right. So -- and do I understand this
24 correctly that if the liquor license issues are
25 resolved in favor of the Heber Avenue Partners that

1 you, as employee, will be entitled to a transition
2 bonus of \$240,000?

3 A. That is incorrect.

4 Q. Okay. What is wrong? What did I -- what
5 do you --

6 A. I think if you were to refer to Section 3,
7 "Duties and extent of services," basically, my
8 involvement, continued involvement, at the property
9 is on two levels. The first level is initial, which
10 is during the time I am to work with Heber Avenue,
11 LLC and their appointed management company to
12 transition all of the necessary regulatory licensing
13 and other permits that are needed to run the
14 property. During that time, I would remain in place
15 as a manager as per the code of the Alcoholic
16 Beverage Act to keep licenses such as the liquor
17 license and the license for Park City and other
18 licenses in place so that there is no disruption of
19 the business. At that same time, I will be involved
20 in working with the homeowners who are part of the
21 rental program to facilitate their transition from
22 Cloud 9 and SL Management to the new entity that will
23 be running the property, as well as working with the
24 employees to keep them in a positive frame and
25 hopefully retain as many as possible. In addition to

1 that, I will be involved in the community and with
2 government agencies to make the transition as
3 seamless as possible to retain the value of the
4 property.

5 Q. Thank you. And upon the successful
6 completion of the license transfer described here,
7 then you, as employee, would be entitled to the
8 transition bonus of \$240,000; is that correct?

9 A. Upon the completion of everything I just
10 told you.

11 Q. That wasn't the question.

12 A. Being very precise, there is no transfer
13 of any licenses in the state of Utah particularly --

14 Q. Would you just -- if you would just please
15 answer my questions. I'm going to try to make them
16 as simple as I can.

17 A. Okay.

18 Q. And so, let's just do that. Upon
19 completing what is described in here as license
20 transfer, then you, as employee, will be entitled to
21 the transition bonus of \$240,000; is that correct?

22 A. Correct.

23 Q. Thank you. And that is, if I read this
24 correctly, at your option, the employee's option, you
25 can either have it in a lump sum within 30 days or in

1 equal monthly installments over the balance of the
2 employment term, which I believe to be 24 months; is
3 that correct?

4 A. That's correct.

5 Q. Thank you. Mr. Shoaf, in this case -- and
6 I'm sorry, I do not have the docket entry, but
7 everybody else will have it but me -- there has been
8 filed a declaration of Michael B. Blumenthal, counsel
9 for the debtor, regarding tabulation of votes. Are
10 you familiar with that document? Did you happen to
11 see that as a participant in the hearing?

12 A. I may have. I'm not -- I don't have all
13 these documents sort of committed to memory.

14 Q. I don't blame you. Thank you.

15 MR. WILSON: I'm going to -- I don't
16 propose to have it marked. I suppose it would be
17 useful for the lawyer participants and the Court to
18 at least have access to it. Does one of you have a
19 docket entry on that? I believe it was lodged with
20 the Court yesterday morning -- Friday morning.

21 MR. BLUMENTHAL: Your Honor, it was filed
22 the morning -- I believe Friday morning. We can
23 stipulate that that document was filed Friday
24 morning. We just don't know what the docket entry is
25 as we sit here.

1 MR. WILSON: It's called "Declaration of
2 Michael B. Blumenthal."

3 THE COURT: Actually it's filed, I think,
4 as an affidavit, but it is the docket entry 590. It
5 appears to be the last docket entry.

6 MR. WILSON: Thank you.

7 Q. (By Mr. Wilson) Mr. Shoaf, I'm going to
8 try to be fair, but you don't have a copy of this and
9 I've only got one. But let's just -- let me try it
10 and -- the document filed by debtor's counsel is
11 really an administrative document. It's not uncommon
12 in cases of this sort. But it lists a Class 4 --
13 well, excuse me. It lists Class 6 claims that have
14 voted on the plan, and it lists claims for
15 Development and Management.

16 THE COURT: Mr. Wilson?

17 MR. WILSON: Yes.

18 THE COURT: I have a copy you could give
19 Mr. Blumenthal -- not Blumenthal -- Mr. Shoaf. That
20 will be fairer.

21 MR. WILSON: Thank you. I don't think we
22 need to mark it. Thank you. I'm always happy to
23 have that help.

24 Q. (By Mr. Wilson) Would you please turn to
25 what has been nominated as Exhibit A11? It's the

1 second-to-the-last document.

2 MR. BLUMENTHAL: Are you referring to the
3 page that has the Class 6 ballots on it?

4 THE WITNESS: Okay.

5 Q. (By Mr. Wilson) Thank you. This will
6 make it easier. Look at the first entry, "Cloud 9
7 Development."

8 A. Uh-huh.

9 Q. And it lists the address of the claimant,
10 William Shoaf, manager, and then a vote. Do you see
11 the column in the middle, right in the middle,
12 "Accept, reject," and it lists that claim as having
13 been accepted?

14 A. Uh-huh.

15 Q. Did you, as manager of Cloud 9
16 Development, accept the treatment as reported in
17 Class 6 with regard to the --

18 A. I'm sorry, did I what?

19 Q. Let me try that again.

20 MR. BLUMENTHAL: Your Honor, it's somewhat
21 confusing. The witness is -- I don't believe has
22 ever seen this document. It's my declaration. I'd
23 be more than happy to clarify anything on this
24 document for Mr. Wilson. But I'm not sure that --
25 it's relatively confusing to ask a witness to testify

1 about a document he has never seen or, in fact,
2 didn't prepare.

3 MR. WILSON: My question -- excuse me --
4 oh, go ahead.

5 THE COURT: Mr. Wilson, can't you ask
6 Mr. Shoaf the question without referring to a
7 document?

8 MR. WILSON: Sure. And --

9 THE COURT: I mean, I understand
10 Mr. Blumenthal's point is that -- and I think you are
11 trying to help Mr. Shoaf, but --

12 MR. WILSON: You've got it, your Honor,
13 and --

14 THE COURT: I think you can just ask the
15 question --

16 MR. WILSON: What I'm really interested in
17 is if this accurately reflects a vote which he cast.
18 So I'm going to go right there.

19 Q. (By Mr. Wilson) Mr. Shoaf, did you as
20 manager of Cloud 9 Development submit a rejecting --
21 excuse me -- an accepting ballot on the scheduled
22 claims of Development?

23 A. Yes.

24 Q. Thank you. And it's a little confusing
25 because they -- it appears as though in certain

1 respects the claims of Development and Management
2 have been lumped and jumbled a little bit. But did
3 you likewise --

4 A. They have not.

5 Q. They have not been jumbled? Okay.

6 But did you likewise submit on behalf of
7 Management an accepting ballot to the plan that is
8 before the Court for confirmation?

9 A. Yes.

10 Q. Thank you. Did you -- was there any
11 meeting of members or any official meeting with
12 regard to the voting -- the voting or balloting with
13 regard to those two claims?

14 A. No, because our bylaws allow for each
15 member to bind without meeting.

16 Q. If you would look at, please, Class 7.

17 A. Uh-huh.

18 Q. Easy Street Mezzanine, LLC?

19 A. Yes.

20 Q. That would be the Class 7 equity security
21 holder -- in bankruptcy parlance, the owner of the
22 equity?

23 A. Yes.

24 Q. Are you the manager of Easy Street
25 Mezzanine?

1 A. Along with Philo Smith and Michael Fader,
2 yes.

3 Q. Okay. And did you, in fact, submit as
4 reported in this declaration an accepting ballot on
5 behalf of Easy Street Mezzanine?

6 A. Yes, I did.

7 Q. Thank you. By casting the ballots that we
8 have just talked about here, and if, in fact, the
9 casting of those ballots lead to confirmation of the
10 plan before the Court, isn't it true that that will,
11 in fact, implement the employment agreement?

12 MR. BLUMENTHAL: Objection. First of all,
13 casting of the ballot and the effect of casting of a
14 ballot of a class that gets no return under the plan,
15 which under the code is deemed to reject, will not
16 have a legal effect one way or another. The question
17 is inappropriate, it's misleading, and I also object
18 to the form.

19 MR. WILSON: I was fairly proud of that
20 question, your Honor, I can surely never duplicate
21 it.

22 MR. BLUMENTHAL: Well, there is absolutely
23 no connection between the casting of the ballot and
24 the employment of --

25 THE COURT: I think the question is

1 misleading.

2 MR. WILSON: I'm going to -- let me
3 compartmentalize a little bit.

4 THE COURT: I'm going to sustain the
5 objection.

6 MR. WILSON: Thank you, your Honor.

7 Q. (By Mr. Wilson) Mr. Shoaf, did you, in
8 fact, cast the ballots that we have just discussed in
9 testimony today?

10 MR. BLUMENTHAL: Objection. Asked and
11 answered.

12 THE COURT: Sustained.

13 MR. WILSON: Thank you.

14 Q. (By Mr. Wilson) And if this plan is --
15 before the Court -- is confirmed today or pretty
16 soon, you agree that that will then implement the
17 employment agreement that is Exhibit 9?

18 A. Along with many other things, yes, sir.

19 Q. Thank you. And that you will then be
20 entitled to such benefits personally as are outlined
21 in Exhibit 9, Employment Agreement?

22 MR. BLUMENTHAL: Object. The employment
23 agreement provides for when and if Mr. Shoaf will be
24 entitled to benefits. It doesn't derive from the
25 plan.

1 MR. WILSON: I hope my question --

2 MR. BLUMENTHAL: It's a very misleading
3 question and it's just inappropriate.

4 MR. WILSON: I hope my question was -- and
5 let me just try to again. May I, your Honor?

6 THE COURT: All right.

7 MR. WILSON: Let me just see if I can
8 remedy it. Well, you know, I'm --

9 THE COURT: You probably have the evidence
10 in, Mr. Wilson.

11 MR. WILSON: So do I.

12 THE COURT: If the plan gets confirmed, we
13 have an employment agreement and it --

14 MR. WILSON: You know, it's -- your Honor,
15 I've come to the same conclusion. Not as soon as the
16 Court did, but shortly after and that concludes my
17 questions.

18 THE COURT: All right. Thank you.

19 MR. WILSON: Thank you, Mr. Shoaf.

20 THE WITNESS: Thank you, sir.

21 THE COURT: Any redirect?

22 MR. BLUMENTHAL: Well, I would wait to see
23 if anyone else has any cross-examination before I
24 conduct redirect.

25 THE COURT: All right. Is there any other

1 party wishing to cross-examine Mr. Shoaf?

2 And, actually, I guess it wouldn't be
3 redirect. I guess it could also be
4 cross-examination.

5 MR. BLUMENTHAL: Whatever. And Mr. Havel
6 has a couple of questions, but he has agreed I'll go
7 first and he'll go second.

8 THE COURT: That's fine.

9

10 REDIRECT EXAMINATION

11 BY MR. BLUMENTHAL:

12 Q. By the way, when Mr. Wilson showed you the
13 ballot certification, did you notice on there that it
14 was also a vote -- two votes: One on behalf of --
15 for Class 6, one on behalf of Management to reject
16 the plan, and one on behalf of Development to reject
17 the plan that was filed by David Wickline?

18 A. Where would I find that?

19 Q. Can I...

20 A. Oh, yes, sir.

21 Q. It's actually reflected that it was filed
22 by Mr. Wilson on behalf -- do you see that?

23 A. Yes, sir.

24 Q. I would ask you the same question
25 Mr. Wilson asked you. Did Mr. Wickline call you to

1 discuss or was there a meeting in conjunction with
2 him casting those two rejections?

3 A. No, sir.

4 Q. Would it be safe to say that both
5 Development and Management are effectively
6 deadlocked?

7 A. Yes, sir.

8 Q. Now, you testified that there was -- that
9 the employment agreement, there was one additional
10 item. Isn't it correct that the employment agreement
11 won't change, but there was a requirement that you
12 had that there is a non-disparagement provision in
13 there, correct?

14 A. With Gemstone, yes, sir.

15 Q. No. In the employment agreement, there is
16 no non-disparagement agreement, sir?

17 A. I'm sorry. Ask the question.

18 Q. Isn't it a requirement that in the
19 Gemstone Management agreement that is going to be
20 executed, that they likewise agreed to a
21 non-disparagement?

22 A. That is correct.

23 Q. And you are simply waiting to see that
24 their management agreement, in fact, has an
25 appropriate non-disparagement provision before you

1 actually execute the employment agreement; isn't that
2 correct?

3 A. That is correct.

4 Q. Also attached to the employment
5 agreement --

6 A. I think it's -- uh-huh.

7 Q. I would ask you to turn to the schedule
8 next to that and that lists all of the permits,
9 contracts, and items that are defined as the
10 agreements that need to be effectively either
11 transferred or re-issued in the name of the
12 reorganized debtor prior to any entitlement to the
13 provision that you testified to, which would entitle
14 you to \$240,000; is that correct?

15 A. That is correct.

16 Q. Isn't it also correct that under the -- I
17 think you testified to this on direct, but I just
18 wanted to make it clear -- that liquor licenses are
19 not transferred in the state of Utah; isn't that
20 correct?

21 A. That is correct.

22 Q. And isn't it also correct that no one is
23 allowed to receive any remuneration in conjunction
24 with passing liquor licenses in the state of Utah?

25 A. That's correct.

1 Q. When Easy Street Partners was formed along
2 with Easy Street Holdings in which the equity
3 security holders actually owned their equity, how
4 much money did David Wickline contribute?

5 A. \$50,000.

6 Q. And how much has he taken out to date?

7 A. \$285,000.

8 Q. So he has absolutely no money at risk in
9 this case; isn't that correct?

10 A. Yes, sir.

11 Q. And he is only to receive a promote if
12 there were eventually profits; is that correct?

13 A. That is correct.

14 Q. And what is a promote?

15 A. A promote would be after all loans were
16 repaid and their interest and after the -- in this
17 particular case, PC I and Philo Smith Trust received
18 their repayments of their initial equity.

19 Q. Okay. And you testified on direct as to
20 all the claims that exist against this estate,
21 correct?

22 A. That's correct.

23 Q. Is there any likelihood that the equity
24 security holders would ever receive any money?

25 A. No, sir.

1 Q. Now, did you contribute anything when Easy
2 Street Partners and the related Easy Street Holdings,
3 Easy Street Mez were formed?

4 A. Yes. Under the Holdings operating
5 agreement, I was required to contribute the business
6 of Easy Street Brasserie Restaurant, which existed
7 prior to the formation of this company, which had 180
8 thousand --

9 MR. WILSON: Objection, your Honor. That
10 was a yes or no question. We've gone well beyond yes
11 or no.

12 THE COURT: Yes.

13 Q. (By Mr. Blumenthal) What were you
14 required to contribute?

15 A. Two things. The Easy Street Brasserie
16 business and trademarks and names had \$180,000 net
17 operating income at the end of the last year it was
18 fully in operation.

19 Q. How many years were left under the
20 lease --

21 MR. WILSON: Your Honor, excuse me, your
22 Honor. The questions are being answered well beyond
23 the question. I know that happens, but there is a
24 tremendous amount of voluntary testimony being given.

25 THE COURT: Well, I think the question

1 was, what was he required to --

2 MR. BLUMENTHAL: Okay. I can ask a
3 follow-up question, your Honor.

4 THE COURT: All right --

5 MR. WILSON: I think it's well in, but --

6 MR. BLUMENTHAL: I'll ask the follow-up
7 question.

8 Q. (By Mr. Blumenthal) What was the value of
9 the Easy Street Brasserie lease that was
10 contributing?

11 MR. WILSON: Object. Foundation.

12 Q. (By Mr. Blumenthal) What was the net
13 operating income of the Easy Street Brasserie just
14 prior to its -- your contribution into the project?

15 A. \$180,000.

16 Q. And how many years remained under the
17 lease?

18 A. Seven.

19 Q. And if you used a 12-percent cap rate,
20 what would that be? What would the value have been?

21 MR. WILSON: Objection. Foundation.

22 THE COURT: Sustained.

23 Q. (By Mr. Blumenthal) Do you have an
24 opinion as to how much that it was worth?

25 A. 1.5 million.

1 MR. WILSON: The answer to that question,
2 I think, was yes or no.

3 THE COURT: All right.

4 MR. WILSON: It happens, but perhaps if
5 the witness could be admonished to listen carefully
6 and respond carefully.

7 THE COURT: Okay, Mr. Wilson.

8 Just so we can get this moved along,
9 Mr. Shoaf --

10 Q. (By Mr. Blumenthal) What is your opinion
11 as to how much that lease is worth?

12 A. 1.5 million.

13 Q. Now, did you contribute anything else
14 besides the Easy Street Brasserie lease?

15 A. Yes, sir.

16 Q. What was that?

17 A. The master plan development agreement
18 between Cloud 9 Resorts and Park City Municipal
19 Corporation for the development of Sky Lodge.

20 Q. And, again, you were -- was that master
21 development plan contract ever valued?

22 A. The property post-contract and
23 pre-contract were valued by Cushman & Wakefield.

24 Q. How much was that?

25 MR. WILSON: Objection. Foundation. Lack

1 of foundation.

2 Q. (By Mr. Blumenthal) Are you -- are you
3 personally familiar with how much that was valued at?

4 A. Yes.

5 Q. How much?

6 MR. WILSON: Objection, your Honor.
7 This -- the testimony is if it's been valued, is to
8 bring in the people that valued it.

9 MR. BLUMENTHAL: No. I asked him if he
10 was aware of how much it was valued at.

11 MR. WILSON: Well, I think -- I think the
12 next question was --

13 THE COURT: Well, I'm going to allow the
14 questioning, Mr. Wilson. Go ahead, Mr. Blumenthal.

15 Q. (By Mr. Blumenthal) Could you answer the
16 question?

17 A. 18.6 million dollars after the master plan
18 development was approved.

19 Q. Is it -- now, you answered a question by
20 Mr. Wilson about the prior plan and how it treated
21 the Management and Development claims. You mentioned
22 that it would pay Bay North. Was that a mistake?

23 A. Yes.

24 Q. Okay. Now, under that plan, if WestLB --
25 WestLB was being paid in full under that prior plan;

1 isn't that correct?

2 A. That was -- that is correct.

3 Q. And they would have been paid over a
4 period of four years; is that correct?

5 A. That is projected, yes.

6 Q. Projected, right. And the Management
7 Development claims would not have been paid prior to
8 that four years, and if, and only if, the plan funder
9 agreed to pay; is that correct?

10 A. That's correct.

11 Q. Oh, by the way, does Easy Street Partners
12 owe any retirement benefits to its employees?

13 A. No.

14 MR. BLUMENTHAL: Okay. Your Honor, that
15 is not truly cross. I just forgot to ask that one
16 question earlier. To save time, I asked it now.

17 Q. (By Mr. Blumenthal) Okay. Now, you had
18 testified that the members of Easy Street Holding
19 removed ABG-SL as a manager; isn't that correct?

20 A. That's correct.

21 Q. And why was that?

22 A. For violation of 6.3(a) of the operating
23 agreement where ABG-SL was required to submit tax
24 returns and file tax returns by February of the
25 following year for the preceding year.

1 Q. And why did ABG-SL not have the tax
2 returns filed?

3 A. Because there was a disagreement as to the
4 treatment of the allocations in 2007 of the phantom
5 income. Mr. Wickline wished to choose one path that
6 I disagreed with, in conjunction with the CPA, and,
7 therefore, I refused to sign the returns.

8 Q. And you wanted to have the tax returns
9 reflect the terms of the operating agreements,
10 correct?

11 A. Yes, sir, as the CPA detailed.

12 Q. And what did Mr. Wickline want to do?

13 A. He wished to offload the -- he wished to
14 allocate the phantom income predominantly to PC I and
15 then to Philo Smith Junior Trust.

16 Q. And that was not in accordance with the
17 operating agreements; is that correct?

18 A. It was not -- it was not what the CPA said
19 was the operating agreement's stipulation.

20 Q. Okay. Now, since ABG-SL was -- have the
21 latest tax returns been filed?

22 A. Yes. All of them through 2010.

23 Q. And they were filed -- I'm sorry, they
24 were filed as the accounting firms suggested,
25 correct?

1 A. Yes, sir.

2 Q. Now, you testified that -- by the way,
3 earlier on you mentioned that David Wickline has not
4 shown up at the property since September 2008,
5 correct?

6 A. That's correct.

7 Q. Has he ever taken any role in managing the
8 Sky Lodge property on any day-to-day basis?

9 A. No, sir.

10 Q. And back in -- strike that.

11 When the --

12 MR. BLUMENTHAL: Your Honor, I may not
13 have any other questions. Let me just confer with
14 counsel.

15 Q. (By Mr. Blumenthal) Now, you had just
16 testified that Cloud 9 SL Management, LLC was -- was
17 and still is virtually deadlocked; isn't that
18 correct?

19 A. Yes, sir.

20 Q. And was that of concern to the other
21 members of this enterprise?

22 A. Yes, it was.

23 Q. And was -- and if the -- and were they
24 contemplating removing Management as the manager of
25 the Sky Lodge?

1 MR. WILSON: Objection. Leading. Lack of
2 foundation.

3 THE COURT: Sustained.

4 MR. BLUMENTHAL: I think that would be
5 cross-examination of his direct, which we agreed to
6 take. I'll re-ask the question, your Honor.

7 MR. WILSON: Well --

8 MR. BLUMENTHAL: I'll re-ask the question.

9 MR. WILSON: Yeah. My --

10 THE COURT: That's okay. I sustained your
11 objection, Mr. Wilson.

12 MR. BLUMENTHAL: Your Honor, I'll re-ask
13 the question.

14 MR. WILSON: Your Honor, tell me, "When
15 you are ahead, shut up," and I will.

16 THE COURT: Just when I put my hand up,
17 that means you can stop.

18 Q. (By Mr. Blumenthal) Could you explain to
19 the Court what, if any, concern -- strike that.

20 Could you explain to the Court what, if
21 any, concern the other members of Holdings and this
22 enterprise had regarding the deadlock of Management?

23 MR. WILSON: Objection. Foundation.

24 THE COURT: Well, I think there is
25 adequate foundation to demonstrate that there was a

1 concern among members of these entities regarding
2 Management.

3 MR. WILSON: I think that is true, but
4 whether he knew it or can speak for others is
5 hearsay. It's beyond anything that he can testify
6 to. He can testify as to his own experience, his own
7 feelings --

8 THE COURT: So far, he hasn't asked
9 him to --

10 MR. BLUMENTHAL: I asked him if he knew.

11 THE COURT: He asked him if he knew.

12 Q. (By Mr. Blumenthal) And did you partake
13 in those meetings?

14 A. On two occasions Liz Rad and one occasion
15 Michael --

16 MR. WILSON: Objection, your Honor.

17 THE COURT: Mr. Shoaf --

18 THE WITNESS: I don't know how to answer
19 these.

20 THE COURT: Well, as briefly as possible
21 and directly in response to Mr. Blumenthal's
22 question.

23 THE WITNESS: Okay.

24 THE COURT: He asked if you had
25 participated in meetings.

1 THE WITNESS: Yes.

2 Q. (By Mr. Blumenthal) And what was the
3 concern?

4 MR. WILSON: Objection --

5 Q. (By Mr. Blumenthal) -- to your knowledge?

6 MR. WILSON: -- foundation to the extent
7 it's founded in hearsay.

8 UNIDENTIFIED SPEAKER: Join the objection
9 in regard to hearsay.

10 MR. BLUMENTHAL: Your Honor, these are
11 discussions among members. If there is so-called
12 hearsay, they would be parties and, therefore, it
13 would be an exception to hearsay. But I'm asking him
14 of what his knowledge was of the concern if
15 Management was removed as the manager. And he has
16 personal knowledge of that and he can testify to
17 that.

18 MR. WILSON: Same objections, your Honor.
19 I think the objections are appropriate.

20 THE COURT: Well, I think it is hearsay.
21 I mean, you are -- you are just in a roundabout way
22 asking him what they said. So I'm going to sustain
23 the objection.

24 Q. (By Mr. Blumenthal) Okay. What would
25 occur if management was removed as manager of Sky

1 Lodge with regard to the liquor licenses?

2 A. They would have to be turned in.

3 Q. And did you participate in meetings in or
4 about September of '09 when you and other members of
5 Easy Street Holdings were considering removing
6 Management as the manager of Sky Lodge?

7 A. Yes.

8 Q. Why were the liquor licenses, when they
9 were up for renewal, registered in the name of the
10 Cloud 9 entities?

11 A. Cloud 9 SL Management is a deadlocked
12 entity whose contract will be rejected. That is
13 common knowledge.

14 MR. WILSON: Your Honor, this answer is
15 not responsive to a very simple, straightforward
16 question.

17 THE COURT: Well, I guess the question I
18 have is, which liquor licenses are we --

19 Q. (By Mr. Blumenthal) How many liquor
20 licenses are there at the premises?

21 A. Four.

22 Q. The one that was identified in W2, which
23 is -- would be Sky Club, why was that license when it
24 was re-registered put in the name of the Cloud 9
25 Resort Clubs, LLC?

1 A. To protect the Easy Street Partners'
2 ability to have continuous liquor service should
3 Cloud 9 Resorts Development or Cloud 9 Resorts SL
4 Management be terminated.

5 Q. And under the plan, that agreement is
6 being rejected; is that correct?

7 A. That is correct.

8 MR. BLUMENTHAL: I have no further
9 questions -- oh, I have one other question. I'm
10 sorry.

11 Q. (By Mr. Blumenthal) In your -- I can't
12 remember if it was in response to Mr. Hofmann or to
13 Mr. Wilson, but when the loan to WestLB matured in --
14 at the end of March 2009, did -- were they also
15 concerned or alleging that there were other covenant
16 defaults under the loan?

17 A. Yes.

18 Q. And they were asserting a loan to value
19 ratio covenant which would not enable Easy Street
20 Partners to extend the loan; isn't that correct?

21 A. Yes.

22 Q. And there were other financial covenants
23 that they claimed would also entitle them not to
24 renew or extend the loan beyond its maturity date; is
25 that correct?

1 A. Yes.

2 Q. Now, when -- do you know when the Jacobson
3 lien was ultimately filed, approximately?

4 A. I honestly off the top of my head don't
5 know.

6 Q. Do you know if it was in 2000 -- the fall
7 of 2009?

8 A. It would --

9 Q. Or later? I'm not...

10 A. I think it was two -- I don't recollect
11 exactly.

12 Q. What was the state of the real estate
13 industry, particularly fractional shares, in Park
14 City in -- sometime in the middle of 2009?

15 A. Very poor, as is the rest of the real
16 estate market.

17 MR. BLUMENTHAL: I have no further
18 questions.

19 THE COURT: Mr. Havel?

20

21 **CROSS-EXAMINATION**

22 **BY MR. HAVEL:**

23 Q. Good morning, Mr. Shoaf.

24 A. Good morning.

25 Q. I wanted to take us back to the project

1 which was originated in 2006; is that correct?

2 A. Yes, it was.

3 Q. And it was built from the ground up and
4 sold and marketed simultaneously through '06 and '07;
5 is that correct?

6 A. Yes, sir.

7 Q. And sometime in late 2007, you were
8 prepared to have a certificate of occupancy and to
9 close the pending sales for the fractional units you
10 had sold by that date; is that correct?

11 A. To be specific, a temporary certificate of
12 occupancy, yes, sir, and to close.

13 Q. And between November of '07 and February
14 of '08, you did close the contracts for fractional
15 units that had been negotiated during that first year
16 and a half; is that correct?

17 A. Yes, sir.

18 Q. And how many did you close in the first
19 wave up until February of '08?

20 A. Up until February, 105.

21 Q. And at that time, did you have other
22 escrows pending for closure of additional sales?

23 A. Another five.

24 Q. Another five. So you had 110 fractional
25 units, in effect, pre-sold up until February of '08;

1 is that correct?

2 A. That's correct.

3 Q. And you closed, you said, 105 of those; is
4 that correct?

5 A. No, we closed all 110.

6 Q. No, up to February of '08, I'm sorry.

7 A. I'm sorry, yes.

8 Q. Okay. And so in February of '08 there was
9 a large amount of sales proceeds generated which went
10 into what we call generically the escrow accounts; is
11 that correct?

12 A. That's correct.

13 Q. And that is the account which there has
14 been much claim made about money being mistakenly or
15 improperly paid over to Bay North, approximately
16 about 5.8 million; is that correct?

17 MR. HOFMANN: Object to the form of the
18 question. Leading. I don't mind on background but
19 when it gets to substance, I don't think it's
20 appropriate to lead this witness.

21 THE COURT: Sustained.

22 Q. (By Mr. Havel) So do you recall how much
23 sales proceeds were approximately held at that time
24 in February of '08?

25 A. Gross or net, sir?

1 Q. In the escrow accounts at that point in
2 time.

3 A. Approximately 32 million.

4 Q. And of that, how much was ultimately
5 disbursed in February of '08 between payments to
6 WestLB and payments to Bay North?

7 A. Twenty-eight million.

8 Q. And how much of that went, again, to Bay
9 North?

10 A. Five point six.

11 Q. And that would be 20 percent of the 28
12 million?

13 A. That would be correct.

14 Q. And the other 22-plus went to the bank,
15 correct?

16 A. Yes, sir.

17 Q. Okay. Now, at that point in February of
18 '08, there was clean-up work to be -- was there still
19 clean-up work to be done by the construction company
20 on the project?

21 A. At what time frame?

22 Q. In February of '08.

23 A. Yes.

24 Q. Okay. So that was done over a continuing
25 period of time, and when did that finally get

1 completed?

2 A. In the summer of '08.

3 Q. And when did you get your final
4 certificate of occupancy or notice of completion?

5 A. In November of '08.

6 Q. Okay. So between February of '08 and
7 November of '08, there was a continued effort to sell
8 fractional units; is that correct?

9 A. Yes, sir.

10 Q. And do you recall how many were sold in
11 that entire period?

12 A. Three.

13 Q. Three. If you had sold during that period
14 fractional units at the rate you had been selling
15 before, would you have had surplus money at that
16 point in time?

17 A. I'm sorry, I don't think I understand your
18 question.

19 Q. Okay. You sold three units between
20 February of '08 and November of '08; is that correct?

21 A. That's correct.

22 Q. Okay. Before February of '08, within a
23 year and a half, you sold roughly 110 units?

24 A. Yes.

25 Q. Okay. If between February of '08 and

1 November of '08 you could have continued to sell at
2 that pace, would you have had sufficient funds to
3 most likely renew the loan with WestLB?

4 A. Oh, absolutely.

5 Q. So the absence of money in February of '08
6 might have been remedied if you had had sales
7 continue during '08 similar to those you had
8 experienced earlier?

9 A. Might have, yes.

10 Q. Do you have an opinion as to why the
11 fractional units didn't sell at the same rate during
12 that year?

13 MR. WILSON: Objection. Foundation.

14 MR. HAVEL: Your Honor, he --

15 THE COURT: Overruled.

16 THE WITNESS: I think we are all aware
17 that the economy of the world went into a tailspin
18 and vacation second homes are not a must-have, they
19 are a want. So people retracted and simply paid for
20 what they needed to pay for and kept their money in
21 money in that period. So we could not get buyers.

22 Q. (By Mr. Havel) And that economic decline
23 continued through '09; is that correct?

24 A. Oh, yes.

25 Q. There was some commentary earlier about a

1 fund -- we call them generally -- in the escrow
2 accounts and the possibility of getting money out of
3 those accounts for contractors. Do you recall that
4 earlier testimony?

5 A. Yes.

6 Q. Were there contractual restrictions on an
7 obligation of WestLB to release money from the escrow
8 accounts for contractor expenses?

9 A. I don't know that I know how to -- I don't
10 know one way or the another.

11 Q. Were there budgetary restrictions in that
12 funds to be disbursed for the contractors had to be
13 within acceptable budgets for the construction of the
14 property?

15 A. Yes.

16 Q. Okay. And if there -- if the requests for
17 disbursements to the contractors had been outside the
18 scope of approved budgets, that would have provided
19 the bank an acceptable basis to deny payment to
20 contractors; is that correct?

21 A. I guess I really don't know how answer
22 that yes or no. We had contingencies and we had
23 overruns and we had contingencies for overruns, and
24 those contingencies were paid out of the escrow
25 accounts. So -- but I don't know sitting here that

1 there was an obligation or a contract that said what
2 anybody should do. I just know that that is where
3 the money would come from if it was paid.

4 Q. And you would be entitled to the money if
5 you otherwise satisfied all the contractual
6 restrictions for the withdrawal; is that correct?

7 A. That's correct.

8 Q. Okay. The reference to payments in
9 February of '08 sometimes refers to it as a mistake
10 by the bank, sometimes as an improper payment by the
11 bank, and you today said that you believe the bank
12 made the payment of the 5.6 to Bay North; is that
13 correct?

14 A. That's correct.

15 Q. Okay. Were the principals of Partners
16 aware of the payments in February of '08 when they
17 were made?

18 MR. HOFMANN: Object. Vague. Specify who
19 the principals are.

20 Q. (By Mr. Havel) Did Mr. Wickline know
21 about the payments?

22 A. Absolutely.

23 Q. Did he encourage those payments?

24 A. Absolutely.

25 Q. Okay. Were there email communications

1 between the principals of the company, including
2 yourself and Mr. Wickline --

3 MR. HOFMANN: Object. Vague and hearsay.

4 MR. HAVEL: Let me finish the question,
5 please.

6 Q. (By Mr. Havel) Were there communications
7 between the bank, Bay North, and Partners regarding
8 the division of the funds 80-20 -- the 28 million
9 between 80 and 20?

10 MR. HOFMANN: Same objection.

11 MR. WILSON: And leading.

12 THE COURT: Overruled. You can answer the
13 question yes or no.

14 THE WITNESS: Could you say that again?

15 Q. (By Mr. Havel) I said, were there email
16 communications between Bay North, the bank, and
17 Partners regarding the division of the 28 million as
18 an 80-20 split?

19 A. Yes, sir.

20 Q. And were you personally aware that that
21 split was being discussed and was going to be made in
22 February of '08?

23 A. Yes, sir.

24 MR. HAVEL: Okay. Your Honor, could we
25 have the witness look at Exhibits 10 and 11 that we

1 had admitted earlier?

2 THE COURT: Those are the debtor's
3 exhibits?

4 MR. HAVEL: Yeah, debtor's exhibits, just
5 10 and 11.

6 THE COURT: So Exhibit 10 is the articles
7 of organization of Management?

8 MR. HAVEL: And the 11 is the articles of
9 organization for Development.

10 THE COURT: Okay. Do you have those,
11 Mr. Shoaf?

12 THE WITNESS: Yes, I do, your Honor.

13 THE COURT: Okay.

14 Q. (By Mr. Havel) Mr. Shoaf, could you look
15 to the second page of the exhibit, Paragraph 7?

16 A. Yes, sir.

17 Q. And could you read that paragraph into the
18 record? It's very short.

19 A. "Management. The company will be
20 member-managed. The names and addresses of the
21 initial managers are: William Shoaf, 4780 Winchester
22 Court, Park City, Utah, 84098, David Wickline, 4780
23 Winchester Court, Park City, Utah 84098. Either
24 manager has the authority to bind the company."

25 Q. And in Exhibit 11 at the same Paragraph 7,

1 does that in effect say the same substance?

2 A. Yes, sir, it does.

3 Q. Okay. So based on these documents, did
4 you believe at all times that you had the authority
5 to bind Management and Development in the operation
6 and conduct of its business?

7 MR. WILSON: Objection. Leading.

8 THE COURT: Overruled.

9 THE WITNESS: Yes, sir.

10 Q. (By Mr. Havel) One last line here. We
11 had discussed earlier what some prior plans had
12 contemplated giving to Management and Development,
13 and I believe it was disclosed that there had been
14 some concept of a subordinated note that would be
15 paid after the first four years of operation at the
16 discretion of the plan funder; is that correct?

17 A. That is correct.

18 Q. And based on your earlier testimony, isn't
19 it true that you could not find a plan funder that
20 would be willing to proceed with the plan with those
21 terms in it?

22 A. We did not find a plan funder; that is
23 correct.

24 Q. Okay.

25 MR. HAVEL: No further questions, your

1 Honor.

2 THE COURT: Any other questions,
3 Mr. Wilson?

4 MR. WILSON: I'm looking at the clock and
5 I believe I can wrap up in about a minute. Try?

6 THE COURT: Yes.

7 MR. BLUMENTHAL: Hold him to that.

8 MR. WILSON: Thank you.

9

10 RECROSS-EXAMINATION

11 BY MR. WILSON:

12 Q. I think we've all been pretty careful to
13 not have this Court try the dispute between you and
14 Mr. Wickline, but certainly there is a flavor.

15 With regard to the tax returns, it's fair
16 to say, is it not, that there was a difference of
17 opinion among tax professionals about what the form
18 that tax return should take?

19 A. No.

20 Q. Okay. With regard to the involvement of
21 you and Mr. Wickline in business together, in a very
22 general sense, you are the operations guy, are you
23 not, with regard to the hospitality industry?

24 A. Yes.

25 Q. All right. And Mr. Wickline, his forte,

1 if you will, had to do with the financing of the
2 project, did it not?

3 A. Yes.

4 MR. BLUMENTHAL: Objection. I don't
5 believe that relates to Management or Development.
6 And if it goes up to his involvement as an equity
7 security holder of Holdings, I would object on the
8 standing grounds.

9 MR. WILSON: He answered it and I'm done.

10 THE COURT: Mr. Wilson, overruled. Answer
11 the question.

12 MR. WILSON: He answered it, actually, and
13 I'm done with that.

14 How much time have I got left?

15 THE COURT: Thirty seconds.

16 MR. WILSON: I won't use it all.

17 Q. (By Mr. Wilson) Under this deadlock and
18 under the plan that is under consideration and for
19 which you have cast votes on behalf of Management --
20 or ballots on behalf of Management and Development,
21 Mr. Wickline will receive nothing; is that correct?

22 MR. BLUMENTHAL: Objection. I don't
23 believe it's pursuant to the deadlock. It's pursuant
24 to the plan.

25 MR. WILSON: Pursuant to the plan.

1 Q. (By Mr. Wilson) And I reform the question
2 so that it says to the plan.

3 A. That is correct.

4 Q. Okay. And under the plan and under the
5 employment agreement, you got two years of employment
6 at \$20,000 a month, this bonus -- what -- really
7 licenses and some other --

8 MR. BLUMENTHAL: Objection. That is not
9 pursuant to the plan. It's -- we went through this
10 on direct -- pursuant to the employment agreement, if
11 we can confirm this case, your Honor.

12 MR. WILSON: And I'll reform that
13 question.

14 THE COURT: Well, the question has been
15 answered.

16 MR. WILSON: Sure. Good. Your Honor, I'm
17 done. And I apologize, I took a minute and a half
18 more but I'll get it back to you sometime. Thanks.

19 THE COURT: All right. Court will take a
20 recess. We'll reconvene at 1:00.

21 THE BAILIFF: All arise.

22 (Recess from 11:48 a.m. until
23 1:04 p.m.)

24 THE BAILIFF: All arise. Court resumes
25 its session. Please be seated.

1 THE COURT: Mr. Blumenthal, do you have
2 any further evidence?

3 MR. BLUMENTHAL: Your Honor, the only
4 other items -- and I don't think we need a witness
5 for this -- in the exhibit tab -- in the exhibit
6 binder, tabs 14 and 15, tab 14 was a court order
7 filed -- it was docketed on April 27, 2010 -- I'm
8 sorry, entered April 27, 2010 granting Easy Street
9 Partners omnibus objection expunging duplicate
10 claims. We would ask that that be made part of the
11 record, and I would ask that that be marked as
12 Exhibit 14.

13 THE COURT: Any objection?

14 MR. WILSON: No objection, your Honor.

15 MR. BLUMENTHAL: And I would have, also on
16 Exhibit tab 15 is debtor's application to employ
17 Gemstone, LLC as a consultant that was filed on
18 November 24, 2009. I believe an order was entered
19 approving that. I'm not sure the date of the order,
20 but we would like the application to go in. It has
21 next to it the CVs of the individuals that have been
22 identified in the plan supplement. So I would ask
23 that that application be admitted as Exhibit 15.

24 THE COURT: Any objection?

25 MR. WILSON: No objection.

1 THE COURT: Exhibits 14 and 15 are
2 received.

3 (Exhibits-14 and -15 received.)

4 MR. BLUMENTHAL: And the debtor has no
5 other evidence to enter at this time, your Honor. I
6 believe WestLB has, at this point, has a couple of
7 clarifications.

8 THE COURT: Mr. Havel?

9 MR. HAVEL: Yes, your Honor, we do. I
10 would call it some cleanup clarifications, but rather
11 than -- the committee has asked if they could proceed
12 with their witness ahead of time, and that is okay if
13 I can defer my comments until later, I think that
14 would be fine.

15 THE COURT: All right.

16 MR. HOFMANN: Your Honor, may I be heard
17 briefly?

18 THE COURT: Yes.

19 MR. HOFMANN: I apologize that my schedule
20 is not ideal today. I have a 1:30 hearing in another
21 matter. When I began the day, I thought that CW
22 Mining would be going on now.

23 THE COURT: So did I.

24 MR. HOFMANN: And that would have been a
25 reasonably acceptable time for me to vacate at 1:30

1 for a hearing before Judge Thurman. The
2 circumstances are a little different now. I'm doing
3 the best I can. All I would ask is the opportunity
4 to address the Court in closing comments.

5 THE COURT: All right. Well, I thank
6 everyone. I think we are all doing the best we can,
7 so -- I'll -- you will have that opportunity,
8 Mr. Hofmann.

9 Mr. Jenkins?

10 MR. JENKINS: Thank you, your Honor. I
11 don't believe the remaining matter that the committee
12 has to present should be too long. I do have with me
13 in court today Mr. Craig Elliott, who has been
14 patiently waiting since Friday to testify or have his
15 testimony proffered with respect to the settlement
16 that is -- appears in the plan whereby the committee
17 dismisses its lawsuit against WestLB in exchange and
18 in consideration for the -- treatment under the plan.

19 If it would be appropriate and in the
20 interest of time, I would propose that I do a short
21 proffer of Mr. Elliott's testimony and then open him
22 to cross-examination by whichever parties wish to
23 cross-examine. That may serve to expedite matters
24 and help us get out of here by 4:45 today.

25 THE COURT: Is there any objection?

1 MR. BLUMENTHAL: The debtor has no
2 objection.

3 MR. WILSON: No objection, your Honor.

4 MR. HOFMANN: No objection.

5 THE COURT: You may proceed by proffer,
6 Mr. Jenkins.

7

8 PROFFER OF TESTIMONY - CRAIG ELLIOTT

9 MR. JENKINS: Thank you, your Honor. And
10 as an initial matter, I would like -- I don't believe
11 this has been made an exhibit to the hearing yet, but
12 I would like to do that at this time. What I have is
13 the stipulation. It is a matter of record in the
14 adversarial proceeding number 10102028. This was
15 referred to on Friday, and if it would be appropriate
16 I'd like to have that marked as Exhibit -- I guess it
17 would be C-1.

18 THE COURT: All right.

19 MR. BLUMENTHAL: And the debtor has no
20 objection to this being admitted into evidence, your
21 Honor.

22 MR. JENKINS: I would ask the Court to
23 admit this stipulation into evidence. It is
24 two-sided, as the Court notes. Do we need a
25 one-sided copy for the Court or a two-sided copy?

1 THE COURT: I think on exhibits, two-sided
2 is fine. Is there any objection to Exhibit C-1?

3 MR. HOFMANN: No, your Honor.

4 MR. WILSON: None, your Honor.

5 THE COURT: Exhibit C-1 is received.

6 (Exhibit-C-1 received.)

7 MR. JENKINS: All right, your Honor, in
8 that case, I'll proceed with the proffer of
9 Mr. Elliot's testimony.

10 Mr. Elliot is in the courtroom and if
11 called to testify would testify as follows: That he
12 is a principal of Elliot Work Group Architects, which
13 is a creditor of Easy Street Partners, having
14 performed architectural services for Easy Street
15 Partners prior to its bankruptcy. But he is the
16 chair of the unsecured creditors committee, which was
17 appointed on October 2nd of 2009, that the other
18 members of the committee are: Shaner Design, Mill
19 Creek Consulting, Gateway Center, Claire Harrison and
20 Havrey, and Goodrich and Thomas CPAs; that on October
21 6th the committee determined to employ the law firm
22 of Jones, Waldo, Holbrook & McDonough as its legal
23 counsel in this case; that during the course of the
24 case, the committee has met virtually weekly with its
25 counsel either in telephonic meetings or on occasion

1 in face-to-face meetings to discuss the case,
2 developments in the case, and certain strategies that
3 might be employed in the case; that he would testify
4 that the committee has instructed its counsel to
5 actively participate in the bankruptcy case to ensure
6 that unsecured creditors receive a recovery in the
7 case.

8 He would further testify that he -- a
9 committee had instructed its counsel specifically to
10 investigate certain facts and issues surrounding the
11 pre-bankruptcy dealings of debtor partners with its
12 lender, WestLB, as well as the Bay North entity,
13 which was a lender at the Mezzanine level, and
14 specifically to investigate the circumstances
15 surrounding the payment of a certain 5.6 million
16 dollars which was made pre-bankruptcy from WestLB to
17 Bay North.

18 He would testify that after hearing the
19 results of that investigation, the committee
20 determined to commence a lawsuit against WestLB
21 seeking to equitably -- seeking to equitably
22 subordinate WestLB's claims to those of unsecured
23 creditors, as well as to allege the recovery or seek
24 the recovery of a fraudulent transfer, which the
25 committee alleged had been made in the form of a

1 release in connection with a forbearance agreement
2 entered into between WestLB and the debtors; that
3 over the past several months, the committee has
4 discussed with WestLB the resolution of the lawsuit
5 in various contexts and in employing various
6 strategies, including in the context of a plan of
7 reorganization in the case; that as a result of those
8 discussions between the committee and WestLB, the
9 current plan provides for a distribution for Class 4
10 unsecured creditors of either one cent on the dollar
11 on their claims payable over approximately three and
12 a quarter years in quarterly installments or a
13 discounted effective date payment of 60 percent of
14 the allowed amount of their claims in exchange for a
15 dismissal of the lawsuit; that in determining that a
16 dismissal of the lawsuit under the plan was
17 appropriate, the committee evaluated the following:
18 That the probability of success on the merits of this
19 lawsuit was uncertain because it was very
20 fact-intensive and it's uncertain what discovery
21 might show when facts -- all the facts are unearthed;
22 that the lawsuit would be very complex because of the
23 underlying facts, because it's very fact-intensive,
24 and because there may be conflicting circumstances of
25 what actually happened, and also that the lawsuit